No. 18-272

IN THE

Supreme Court of the United States

FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,

Petitioner,

v.

AILEEN RIZO,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. The Equal Pay Act permits employers to pay men and women different wages for the same work "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). Is prior salary a "factor other than sex"?

2. May deceased judges continue to participate in the determination of cases after their deaths?

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ARGUMENT

The Court should grant certiorari on both questions presented and reverse.

I. THIS COURT SHOULD DECIDE WHETHER EMPLOYERS MAY CONSIDER PRIOR SALARY.

Respondent Aileen Rizo argues that this case does not implicate the admitted circuit split on the first question presented, that the split is unimportant, and that the Ninth Circuit did not err. Each argument fails.

A. This case implicates an acknowledged circuit split.

Rizo does not dispute that there is a circuit split on the meaning of the Equal Pay Act's catch-all defense. Indeed, she expressly relied on the circuit split in seeking en banc review before the Ninth Circuit. *See* Rehearing Pet. 7 n.3. The EEOC acknowledged it, too. *See* EEOC Rehearing Amicus 6. So did the Ninth Circuit, joining several of its sister circuits in doing so. Pet.App.21a & n.15; *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003); *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005).

That leaves only the question whether this case *implicates* the split. It does. Rizo wins as a matter of law under the rules in the Ninth, Tenth, and Eleventh Circuits; Petitioner would win as a matter of law in the Seventh and Eighth Circuits; and Petitioner would *at least* be entitled to trial in the Second and Sixth Circuits. Pet. 15–16. Rizo nevertheless claims that the circuits unanimously agree that prior pay is not a "factor other than sex" when it is the *on-*

ly factor on which the employer relies to justify a pay disparity. BIO 12. That is not what the cases say.

1. In the Seventh and Eighth Circuits, prior pay, as used in this case, is a "factor other than sex," even when it is considered by itself.

Seventh Circuit. The Seventh Circuit stated this rule unequivocally in *Wernsing*, 427 F.3d at 468. According to Rizo, however, the Seventh Circuit allows employers to rely on prior salary in cases involving internal transfers, but not new hires from different employers. This contention misreads both *Wernsing* and *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir. 1987).

Covington held that the Equal Pay Act does *not* require employers to give a business justification for relying on prior pay—as *Wernsing* reaffirmed twenty years later. *Compare id.* at 322, *with* 427 F.3d at 469–70. In doing so, *Covington* gave several reasons for rejecting out-of-circuit cases that had adopted a business-justification rule. One reason was that those circuits were concerned that relying on prior pay "may serve to perpetuate an employee's wage level that has been depressed because of sex discrimination by a *previous employer*." 816 F.2d at 322 (emphasis added). The issue in *Covington*, the court explained, was "somewhat different" from those cases: "whether [an employer] can consider the prior wages that *it* paid an employee, rather than the wages paid by a previous employer." *Id.* at 322–23. So the court was simply noting a factual distinction, not adopting a legal rule.

Wernsing later rejected the business-justification rule even more forcefully. Judge Easterbrook stated

the court's holding categorically: "Wages *at one's prior employer* are a 'factor other than sex,'" and the employer's reason for using that factor "need not be related to the requirements of the particular position in question, nor must it even be business-related." 427 F.3d at 468, 470 (emphasis added). *Wernsing* mocked the courts that had adopted a business-justification requirement, characterizing the rule as a judge-issued "ukase." *Id.* at 468–69. This reasoning—applicable to pay from a "prior employer" or the same employer, in "both [the] public and private" sectors, *id.* at 467—reflects that nothing in the Equal Pay Act permits drawing an arbitrary distinction between new hires and internal transfers. It also reflects *Wernsing*'s facts. Rizo is wrong to describe *Wernsing* as involving an internal transfer—it involved one government agency's reliance on a new hire's prior pay at a *different* agency. *Id.* at 467 (Office of Inspector General at Illinois Department of Human Services based salary entirely on prior pay at Southern Illinois Enforcement Group). And if there were any remaining doubt that the Seventh Circuit rejects Rizo's internal-transfer–new-hire distinction, in its latest word on the issue, the Seventh Circuit held that prior pay was a factor other than sex in a case involving a male comparator whose higher salary was based on his pay *with a different employer*. *See Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 906, 908–09 (7th Cir. 2017).

Of course, even if the Seventh Circuit had adopted the business-justification rule in the new-hire context, that would not align it with the Ninth Circuit. It would instead align it (in the new-hire context) with the Second and Sixth Circuits. Those courts, as

explained below, would not have ordered the same relief as the Ninth Circuit in this case.

Finally, Rizo makes much of a separate passage from *Covington*: "We do not believe that the EPA precludes an employer from implementing a policy aimed at improving employee morale when there is no evidence that the policy is either discriminatorily applied or has a discriminatory effect." 816 F.2d at 322. Rizo excerpts portions of this sentence to make it appear as though *Covington* adopted a rule forbidding considering prior pay if doing so has a disparate impact. BIO 19. For a while after *Covington*, the circuit expressed some confusion about the role of a disparate-impact analysis. *See Fallon v. Illinois*, 882 F.2d 1206, 1211 n.4 (7th Cir. 1989); *Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994). But *Wernsing* resolved that confusion: "the Equal Pay Act deals exclusively with disparate treatment. It does not have a disparate-impact component." 427 F.3d at 469.

Eighth Circuit. The Eighth Circuit similarly holds that prior salary can be a "factor other than sex," even when it is considered by itself. *See Taylor*, 321 F.3d 710.

Rizo dismisses *Taylor*, claiming it involved a "salary retention" policy, rather than a policy of considering prior pay from different employers. BIO 16–17. Again, that distinction appears nowhere in the Equal Pay Act. Nor does it appear in the Eighth Circuit's decision. *Taylor* consistently referred to "prior salary or salary retention policies," and its reasoning applied with equal force to both: "we reach the same conclusion as the Seventh Circuit which refused to adopt a per se rule that would exclude salary reten-

tion *or past salary* as qualifying 'factors other than sex.'" 321 F.3d at 719 (citing *Covington*, 816 F.2d at 322-23) (emphasis added). The court held that the proper inquiry for *all* facially neutral policies under the catch-all defense is limited to a "search for evidence that contradicts an employer's claims of gender neutrality." *Id.* Rizo does not dispute that Petitioner would win summary judgment under that standard.

Rizo also points to *Drum v. Leeson Electric Corp.*, 565 F.3d 1071 (8th Cir. 2009) (cited at BIO 17), but that decision is consistent with *Taylor*. As in *Taylor*, the court in *Drum* recognized that employers *can* rely on prior salary. *Id.* at 1073. And as in *Taylor*, it recognized that they cannot do so as a pretext—they cannot, for example, use prior salary to "justify lower wages for female employees simply because the market might bear such wages." *Id.* (citing *Taylor*, 321 F.3d at 718). The court went on to hold that the record before it was too underdeveloped to establish whether the pay differential resulted from a valid prior-salary policy or something else; on that basis, it reversed the lower court's summary-judgment award. *Id.* It never, however, suggested that reliance on prior salary—even by itself—is per se improper, as the Ninth Circuit held below.

2. That suffices to establish a certworthy split: Petitioner would have won as a matter of law in the Seventh and Eighth Circuits, but lost as a matter of law in the Ninth. The split, however, is even deeper than that. The Second and Sixth Circuits, unlike the Ninth Circuit, also permit employers to consider prior salary, even by itself. But unlike the Seventh and Eighth Circuits, they insist upon a "legitimate" busi-

ness justification for doing so. *See Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992); *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006).

Rizo does not disagree. Instead, she argues that business-related justifications must relate to job performance, not to other business-related concerns. BIO 13–14. That is irrelevant to whether there is a split: whatever a business-related justification is, employers who prove that they have such a justification for relying on prior pay alone can do so. It also does nothing to undermine the rule's relevance to this case. Whereas the Ninth Circuit's rule entitled Rizo to summary judgment, the Second and Sixth Circuits' rule would *at least* permit Petitioner to proceed to trial, where it could introduce evidence of a business-related justification for the prior-pay policy. Indeed, that is precisely what the Ninth Circuit panel held when it applied that court's earlier decision in *Kouba*, which followed the Second and Sixth Circuit's approach. Pet.App.61a.

3. Finally, Rizo minimizes the substantial differences in approach between the Ninth Circuit and the Tenth and Eleventh Circuits, the two courts that would reach the same bottom-line result in this case.

Rizo concedes that the Eleventh Circuit permits consideration of prior salary as a "factor other than sex," so long as it is considered in conjunction with other factors. *See Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 n.9 (11th Cir. 1988); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) ("[T]here is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay *and* more experience.") She concedes the Tenth Circuit does as well. BIO

14–15. And though she argues that the Tenth Circuit additionally requires a business-related justification for considering prior salary, BIO 14, that has no bearing on the split's relevance to this case: because the salary differential that Rizo challenges is based on prior salary alone, she is entitled to summary judgment in the Ninth, Tenth, and Eleventh Circuits, but *not* in the Second, Sixth, Seventh, or Eighth Circuits.

B. The question presented is important.

Employers across the country consider new employee's prior salaries when setting their pay. *See* Br. for Amici Curiae The Chamber of Commerce of the United States, et al., 9. But Rizo insists that the issue is unimportant, at least "within the Ninth Circuit," because seventy percent of firms in that circuit are located in states that forbid reliance on prior pay. BIO 21.

This argument makes no sense on its own terms; a rule that applies to the hiring decisions of 30 percent of firms in the nation's largest circuit is quite important. Anyway, the relevant question is the issue's importance to the nation as a whole, not "within the Ninth Circuit." And on that score, its importance cannot be disputed. Rizo identifies no state or local laws forbidding employers from considering prior pay aside from California, Oregon, Hawaii, "Massachusetts, Delaware, Puerto Rico, and several major cities." BIO 22. Indeed, several states have explicitly *rejected* such legislation and have *prohibited* their municipalities from enacting it. Br. of Chamber of Commerce 6–7. There are many people in the many miles between California and Massachusetts, and the question presented is important to them.

Rizo finally insists that businesses *can* rely on prior pay even under the Ninth Circuit's rule—as long as doing so creates no pay disparities between men and women. BIO 22–23. That is just a creative way of forbidding reliance on prior pay; if you do, and if it creates a disparity, you have violated the Act.

C. Prior pay is a "factor other than sex."

The Equal Pay Act forbids pay disparities between men and women, subject to four exceptions. The final, catch-all exception is as broad as it is clear: differences in payment are permissible when they are "made pursuant to ... a differential based on any other factor other than sex." Prior pay is not the same thing as sex, and so a pay disparity resting on prior pay is a "differential based on any other factor other than sex." It follows that employers may rely on prior pay, even by itself, without violating the Equal Pay Act.

Rizo's counterarguments are wrong. First, she says that "exceptions" to the Equal Pay Act "are 'narrowly construed against the employers seeking to assert them.'" BIO 25 (quoting *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 232 n.7 (2014)). There is no such principle. The quote from *Sandifer* discusses the "exemptions" codified in § 213 of the Fair Labor Standards Act. 571 U.S. at 232 n.7. And it doesn't even apply *there* anymore: this Court rejected it in *Encino Motorcars, LLC v. Navarro*, because it rests "on the flawed premise that the FLSA pursues its remedial purposes at all costs." 138 S. Ct. 1134, 1142 (2018).

Rizo says her narrow reading is justified by the *noscitur a sociis* and *ejusdem generis* canons, under

which the broad catch-all exception should be read to cover only the same types of factors as the three specific exceptions that precede it. According to Rizo, this means that it covers only "legitimate, job-related factors." BIO 25 (quoting Pet.App.10a). This argument fails on its own terms, because prior pay *is* a legitimate, job-related factor. Pet.17–19; Pet.App. 58a. Anyway, the more obvious similarity between the specifically enumerated exceptions is that each is sex-neutral—each specifically enumerates a factor besides sex. Pet. 24. Reading the catch-all provision to include all sex-neutral factors, including prior pay, thus comports with Rizo's canons *and* the text's plain meaning.

Rizo also argues that Petitioner's reading makes the specifically enumerated exceptions superfluous, since they would all fall under a broad any-other-factor provision. BIO 26. Rizo's own reading has the same problem: if the three specific exceptions all involve legitimate, job-related factors, reading the broad catch-all to cover all such factors makes the first three exceptions in some sense superfluous. The surplusage canon is thus irrelevant.

II. DECEASED JUDGES CANNOT DECIDE CASES.

A. This case presents the additional question whether the en banc Ninth Circuit erred by issuing a decision that included Judge Reinhardt's vote eleven days after his death. This Court's decision in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685 (1960), resolves that question: the answer is "yes."

In *American-Foreign*, this Court addressed the meaning of 28 U.S.C. § 46 as it existed in 1960. That statute governed the composition of en banc panels, just as it does today. And just as it does today, the statute required that cases and controversies "be heard *and determined* by" en banc panels consisting of "circuit judges" in "active service." *Id.* (emphasis added). (Congress has amended the law to permit non-active judges to sit in limited circumstances, but the amendments are irrelevant here.) In *American-Foreign*, the Second Circuit had counted the vote of a judge who sat on the en banc panel while still an active judge, but who retired before judgment issued. The Court held that this violated the statute. Section 46 says that cases must be "determined" by en banc panels consisting exclusively of "circuit judges in regular active service." A case is "'determined' when it is decided." *American-Foreign*, 363 U.S. at 688. Since the retired judge was no longer in active service on the date of the decision, the panel was improperly composed. *Id.*

It follows that the en banc panel was improperly composed when the Ninth Circuit "decided" this case: Judge Reinhardt was no longer in "regular active service" when the court issued its decision. *Id.*

B. Rizo does not even cite *American-Foreign*, thereby forfeiting any argument that it is inapplicable. Instead, she raises several issues that are irrelevant to the suitability of this issue for Supreme Court review.

First, Rizo argues that the question is purely academic, since the Ninth Circuit will just reenter the same judgment with a properly composed panel. BIO 29–30. This Court has not previously consid-

ered the likelihood of a different judgment when vacating judgments issued by improperly constituted courts—the improper composition of the court is a harm unto itself. *See, e.g.*, *Nguyen v. United States*, 539 U.S. 69, 82–83 (2003) (vacating unanimous judgment by appellate panel that included one ineligible judge). In any event, because Judge Reinhardt cast the dispositive vote for the Ninth Circuit's broad rule, vacating the judgment would have a material effect on the rule in the Ninth Circuit.

Second, Rizo claims that the Ninth Circuit here did exactly what this Court did in *J.W. Frellsen & Co. v. Crandell*, 217 U.S. 71 (1910). But *J.W. Fresllsen* did not involve § 46, which applies only to courts of appeals. Rizo's description of *J.W. Fresllsen* is also wrong: the Court in that case "recirculated and again agreed to" to an opinion that Justice Brewer wrote before his death. *Id.* at 75. But unlike Judge Reinhardt, Justice Brewer did not *continue* to participate after his death; Chief Justice Fuller, while crediting Justice Brewer for his work, delivered the opinion for the court. *Id.*

Finally, Rizo insists that there is a ministerial exception to § 46's requirements, under which a case is considered decided once the clerk is asked to "prepare, sign, and enter the judgment." BIO 33 (quoting Fed. R. App. P. 36). Assuming for the sake of argument that this is true, the exception does not apply here: Judge Reinhardt died *eleven days* before the decision in this case. There is no evidence that the Ninth Circuit had already transmitted its decision to the clerk more than eleven days before the decision issued—and the Ninth Circuit was curiously silent on that point when explaining all of the other events

that transpired before Judge Reinhardt's passing. Pet.App.1a n*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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